No. 91-115

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KURT G. OSWALD, as Voluntary Administrator of the Estate of RUSSELL G. OSWALD, Deceased,

Petitioner,

vs.

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERNE BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR.; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, a/k/a Otis McGaughey; DACAJEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit misinterpret and fail to correctly apply this Court's *Whitley v. Albers*, 475 U.S. 312 (1986) "wanton and willful" qualified immunity standard to petitioner's involvement in the efforts to overcome rioting inmates and restore order at the Attica prison in September 1971, during the worst inmate riot in American prison history, by artificially dividing those efforts into three aspects, namely the forceful retaking, the planning for medical needs, and the rehousing of inmates, and then limiting the application of the *Whitley* standard only to the forceful retaking efforts?

2. Even if this Court's *Estelle v. Gamble*, 429 U.S. 97 (1976) "deliberate indifference" standard was applicable to the medical planning and rehousing efforts during the Attica prison riot, did the Second Circuit improperly dilute that standard by construing as "deliberate indifference" conduct of petitioner which was at worst mere negligence?

LIST OF PARTIES

Petitioner

Russell G. Oswald: Mr. Oswald was the Commissioner of the New York State Department of Correctional Services in charge of the New York State prison system during the serious prison riot of September 9-13, 1971. Commissioner Oswald died on March 8, 1991 and a representative of his Estate has been appointed who will be substituted as a party in his place.

Respondents

Plaintiffs: A class designated by the District Court as all inmates in D Yard on September 13, 1971. The names listed in the caption are as follows:

Akil Al-Jundi, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, mother and legal representative of Allen Durham, deceased; Litho Lundy, mother and legal representative of Charles Lundy, deceased; Theresa Hicks, widow and legal representative of Thomas Hicks, deceased; Alice McNeil, mother and legal representative of Lorenzo McNeil, deceased; Mario Santos, mother and legal representative of Santiago Santos, deceased; Laverne Barkley, mother and legal representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernan LaFranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haidu, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip "Wald" Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Sumpter; Omar Sekou Toure, a/k/a Otis McGaughey; Dacajeweiah, a/k/a John Hill; Johnnie Barnes, as administrator of the goods, chattels and credits which were of John Barnes, deceased; on behalf of themselves and all others similarly situated.

Defendants

Petitioner Oswald's Co-defendants

The names and descriptions of Commissioner Oswald's co-defendants are as follows:

Vincent R. Mancusi: Superintendent of Attica Correctional Facility during the Attica rebellion on September 13, 1971.

Karl Pfeil: Defendant Mancusi's Assistant Deputy Superintendent at the Attica Correctional Facility at the time of the rebellion.

The Estate of Major John Monahan: Commander in charge of the state troopers and correction officers who carried out the assault to retake the prison and return the prisoners to their cells.

The Estate of Nelson A. Rockefeller: Governor Rockefeller personally ordered the retaking of the prison. On motion for summary judgment, affirmed by the Court of Appeals, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), the action against the Estate of Rockefeller was dismissed on the grounds of qualified immunity.

Walter Dunbar: Executive Deputy Commissioner of the Department of Correctional Services who assisted Commissioner Oswald during the Attica rebellion. Mr. Dunbar has died and his estate has not been substituted.

John C. Baker: Commander of the National Guard of the State of New York. The National Guard, under General Baker's command, was charged with supplying the necessary supportive medical care. The complaint was dismissed against General Baker for plaintiffs' failure to answer interrogatories.

Other Named Defendants

Other defendants named in the full title, as it appears in the District Court's order of June 26, 1990 denying petitioners'

motion for summary judgment of dismissal, who neither have been joined nor have participated in the proceedings below:

T. Norman Hurd: Director of State Operations of the State of New York.

Wim Van Eekeren: Deputy Commissioner of the Department of Correctional Services of the State of New York.

A.C. O'Hara: Commissioner of the Office of General Services of the State of New York.

John C. Miller: Chief Inspector of the Division of State Police of the State of New York.

Leon Vincent: Deputy Superintendent of the Attica Correctional Facility under Superintendent Mancusi.

Robert F. Fischer: Special Deputy State Attorney General in charge of Attica prosecutions.

Dalton Carney: Sheriff of Wyoming County, New York, the county where the Attica Correctional Facility is located.

Other Defendants

Officers and members of the New York State Police who are named in the title of this action and described in paragraph 33 of the Complaint as State Police officers who "participated in and/or failed to take steps to prevent the acts complained of", but who have not been served by the plaintiffs nor made parties to the action are the following: William Henry, J.C. Moochler, A.T. Malovich, Robert P. Quick, W.L. Shurter, K.E. Gellert, G.K. Elbert, T.N. Kruk, W.K. Dillon, M.K. Halloran, K.S. Crouse, R.J. Dwyer, P.P. Zelinski, G.R. Toray, J.B. Connell, B. Muthig, D.O. Parr, J.J. Patterson, J.W. McCarthy, D.O. Ellis, E.M. Byre, and John Does, Nos. 1-100.

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RUSSELL G. OSWALD,

Petitioner,

VS.

AKIL AL-JUNDI, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Russell G. Oswald petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case. Because the Second Circuit's decision is so clearly erroneous in light of *Wilson v. Seiter*, 59 U.S.L.W. 4671 (U.S. June 17, 1991) (No. 89-7376), decided after the Second Circuit decided the instant case, Petitioner Oswald requests that this Court enter an order reversing outright the Second Circuit's decision or, in the alternative, remanding to the Second Circuit for reconsideration in light of the *Wilson* decision, pursuant to Rule 16 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals (A. 1-12)[1] is reported as *Al-Jundi v. Mancusi*, 926 F.2d 235 (2d Cir. 1991). The opinion of the District Court which was the subject of the appeal to the Second Circuit, dated June 26, 1990 (A. 13-25), is not reported.

JURISDICTION

On February 27, 1991, the Second Circuit modified and affirmed the decision of the United States District Court for the Western District of New York which had denied Petitioner Oswald's motion for summary judgment. A petition for rehearing and suggestion for rehearing *en banc*, timely filed, was denied on April 18, 1991 (A. 26-27). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The statutory basis for federal jurisdiction is 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Constitutional Provisions:

A. U.S. Constitution, Amendment VIII..... A. 28.

B. U.S. Constitution, Amendment XIV..... A. 28.

II. United States Statutes:

A. 42 U.S.C. §1983..... A. 28-29.

B. 28 U.S.C. §1254..... A. 29.

STATEMENT OF THE CASE

This Petition seeks the Court's review of the proper application of the standard for qualified immunity to be applied to petitioner Russell G. Oswald, who was the Commissioner of the New York State Department of Correctional Services in charge of the New York State prison system during the course of the most severe

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[1] "A." references to pages in the Appendix to this Petition.

inmate riot which had ever occurred in the United States. This case presents an opportunity for this Court to further elucidate the standards of *Whitley v. Albers*, 475 U.S. 312 (1986), *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Wilson v. Seiter*, 59 U.S.L.W. 4671 (U.S. June 17, 1991) (No. 89-7376), to clarify the circumstances to which these decisions are intended to apply, in light of the Second Circuit's recent failure to apply the *Whitley* standard properly to Oswald's conduct during this catastrophic four-day prison uprising, and in light of this Court's decision in *Wilson*, which was decided after the Second Circuit's decision herein. Because the Second Circuit's decision is so clearly erroneous that oral argument is unnecessary, the decision can be reversed summarily or remanded to the Second Circuit for review in light of *Wilson*, pursuant to Rule 16 of the Rules of the Supreme Court of the United States. *See, e.g., Mason v. City of Biloxi, Mississippi*, 385 U.S. 370 (1966); *Johnson v. Virginia*, 373 U.S. 61 (1963); *United States v. Haley*, 358 U.S. 644 (1959).

On September 9, 1971 at approximately 8:45 a.m., more than 1200 inmates at the New York State Correctional facility at Attica, New York ("Attica") rioted and violently took control of major portions of the facility. They physically attacked several correctional officers, causing severe injuries which later resulted in the death of one officer; they took and held as hostage 43 persons including correctional officers and civilian employees of the facility. The rioting prisoners were soon in control of a substantial segment of the prison. Although State Police and correction officers regained control over part of the prison later that day, the rioters remained in control of a prison yard (known as D Yard) throughout the four days the riot lasted.

Oswald, the New York State Commissioner of the Department of Correctional Services at the time of the riot, was a well-known advocate of prison reform. He arrived at Attica several hours after the uprising began. Upon his arrival, Commissioner Oswald chose to seek a peaceful resolution of the uprising rather than to order an immediate retaking of the facility by forceful means. He embarked upon a course of negotiation and conciliation with the inmates late in the afternoon of September 9, engaging in several face-to-face meetings with the inmates which

placed his own life in jeopardy in an effort to resolve the crisis peacefully and secure the release of the hostages. He immediately granted a number of inmate requests, including that food and water be provided, that certain individuals named by the inmates (later to be known as "observers") be brought to Attica, and that the media be allowed into the prison.

During the course of negotiations which lasted until the morning of September 13, Mr. Oswald acceded to 28 of the inmates' 31 demands, most of which sought improvements in prison conditions. The Governor approved Oswald's decision to accept those demands. There were three demands, however, to which Mr. Oswald could not agree: (i) the resignation of Vincent Mancusi, the then-Superintendent of Attica; (ii) safe transport for the inmate leaders to a non-imperialist country; and (iii) complete amnesty for crimes committed during the course of the uprising.

Because the negotiations were stalled on these points, the tensions in the prison increased, heightened by the death of the injured guard on September 10. Two inmates were seriously injured, presumably by fellow prisoners, one so critically that he was permitted to leave the prison yard. The hostages were threatened with death repeatedly during this period.

While negotiations were continuing, inmates could be seen manufacturing spears, knives and other weapons, making explosive devices such as Molotov cocktails, building and electrifying barricades, digging trenches, and otherwise fortifying themselves. They were also known to have at least two tear gas guns (lethal at close range) and possibly other firearms. (It was later learned that the inmates were in possession of over 1400 weapons.)

Recognizing that the inmates were becoming more and more entrenched, both in terms of their physical ability to withstand a forcible retaking of the prison and in terms of their unwillingness to yield in their demands, and fearing for the safety of the hostages, against whom death threats were becoming more and more frequent, on Monday morning, September 13, 1971 Commissioner Oswald delivered an ultimatum to the inmates, reciting his efforts to peacefully resolve the situation and requesting that the hostages be released and order restored to the

facility. He expressed his hope and prayer that the inmates' response would be in the affirmative.

The inmates' response, however, was to parade eight bound and blindfolded hostages on various catwalks around the prison with knives held to their throats. The inmates then twice rejected Oswald's urgent appeal to release the hostages and return to their cells.

Having given up all hope of a peaceful resolution of the crisis, Commissioner Oswald ordered, with the concurrence of Governor Nelson Rockefeller, the forceful retaking of the prison by the New York State Police.

The actual plan for retaking the prison was formulated principally by Major Monahan of the State Police, with the assistance of other State Police and prison officials. The responsibility for the provision of medical care for any injuries that might be suffered during the course of retaking was assigned to the New York National Guard. A medical unit of the National Guard had been mobilized the night before the retaking and, at the time the order was given to retake the prison, was less than a mile away. In addition, doctors at hospitals in Warsaw and Batavia had been placed on disaster alert.

The rescue and retaking operation was undertaken on the morning of September 13, 1971. After laying down a cloud of tear gas, a contingent of State Police, prison guards, County Sheriff's Officers and park police moved into the prison. Ten hostages and 29 prisoners were killed and another three hostages and 85 prisoners were wounded by gunfire. Several hostages had their throats slit by inmates immediately upon the commencement of the retaking action. The bodies of three inmates who had apparently been killed by other inmates during the four days of rioting were discovered.

During the course of restoring order to the prison, it was necessary to rehouse the more than 1200 inmates who had been in D Yard during the riot. Because large portions of the prison had been seriously damaged during the uprising, and because the area had been fortified and possibly booby-trapped by the inmates, this rehousing effort took a number of hours and order

was not fully restored to the prison until after the rehousing was completed. During this period, several prisoners were reported to have been tortured, beaten and threatened.

Because of the extent of the injuries following the forcible retaking, the medical care provisions had to be augmented by medical personnel from the adjoining County of Erie. These additional medical services were in place by mid-afternoon on September 13. No inmate died from lack of medical care.

This civil rights action was commenced in 1974 by prisoners present in D Yard on September 13, 1971, the day of the operation to rescue the hostages and retake control of the prison, and by the legal representatives of the prisoners who died during the insurrection. In October of 1979 the action was certified as a class action. The defendants are former officials of the State of New York, who are sued in their individual and official capacities.

The plaintiffs, who seek compensatory and punitive damages in excess of $4 billion, allege causes of action under 42 U.S.C. §§1983 and 1985(3) predicated on violations of the Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments to the United States Constitution.

On June 26, 1990, the District Court for the Western District of New York, in response to Petitioner Oswald's motion for summary judgment dismissing the complaint on the grounds of qualified immunity, decided that the evidence concerning Oswald's part in the plan to retake the prison creates jury issues which preclude sustaining, as a matter of law, a qualified immunity defense to this aspect of plaintiffs' allegations. The District Court also held that there was a genuine issue of fact regarding Oswald's role in the reprisals against the prisoners which precluded its sustaining a qualified immunity defense. The third portion of the Complaint – the prosecution of the prisoners following the putting down of the riot – was dismissed as against Oswald. (A. 13-25).

The Second Circuit Court of Appeals found that "no reasonable jury could find that Oswald did not have objectively reasonable grounds for believing that the decision to retake the

prison and the plan for doing so did not involve the wanton infliction of pain." (A. 1-12.) Therefore the Second Circuit reversed the District Court and dismissed that portion of the complaint against Oswald on the ground of qualified immunity. However, the Second Circuit then upheld the District Court's determination that Oswald's decision to leave the planning for the post-retaking medical needs of the prisoners to the National Guard gives rise to a jury issue. The Court also upheld the District Court's finding that qualified immunity does not apply to the allegations that Oswald condoned the alleged reprisals against the prisoners. Finally, the Second Circuit upheld the dismissal of the prosecution portion of the complaint allegations against Oswald.

A timely petition for rehearing and a suggestion for rehearing *en banc* was denied by the Second Circuit. (A. 26-27.)

Petitioner Oswald died on March 8, 1991. His son, Kurt G. Oswald, has been appointed Voluntary Administrator of the Estate for the limited purposes of defending this lawsuit by the Albany County's Surrogate's Court. The plaintiffs are presently in the process of having the Estate of Russell G. Oswald substituted as a defendant herein. Counsel for petitioner will continue to represent the substituted party.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW IS IN CONFLICT WITH THE TEACHINGS OF THIS COURT CONCERNING QUALIFIED IMMUNITY

This case presents an important and recurring issue of Constitutional law regarding which the Second Circuit misconstrued and misapplied this Court's recently rearticulated standards for determining whether or not a public official is entitled to qualified immunity. The Second Circuit's analysis and application to Oswald's conduct of the "deliberate indifference" and "wanton and willful" standards propounded by this Court to test official conduct in Eighth Amendment claims is in direct conflict with this Court's instructions.

To begin with, the Second Circuit incorrectly failed to apply the *Whitley v. Albers*, 475 U.S. 312 (1986), "wanton and willful" standard to all aspects of the necessary efforts to suppress the worst riot in United States prison history and restore order at the maximum security facility at Attica. Instead, the Court artificially differentiated the numerous decisions and actions involved in the efforts to finally end the exceedingly tension-filled, threatening and tumultuous events of the insurrection by failing to recognize that all decisions made and all actions taken prior to the moment the very last prisoner was secured in a cell were *precisely* the type of decisions and actions the *Whitley* court, in a case which dealt with a single brief incident under far less serious riot conditions, was expressly concerned with protecting from subsequent second-guessing. After it artificially divided the decisions and actions into (i) the planning for the forcible assault to retake the prison, (ii) the planning for the medical needs following the assault and (iii) the post-assault rehousing aspects of the efforts to restore order at Attica, the Second Circuit limited the *Whitley* "wanton and willful" analysis solely to the forcible assault aspect of these necessary efforts to suppress the Attica riot.

The Second Circuit then purportedly applied the *Estelle v. Gamble*, 429 U.S. 97 (1976), "deliberate indifference" analysis, an analysis this Court has instructed is limited to decisions and actions undertaken during the ordinary, day-to-day operations of a prison facility, to deny Oswald qualified immunity for his decision to rely upon the National Guard for the planning for the medical needs of the prisoners following the forcible retaking and for his conduct during the rehousing. In fact, however, the Court of Appeals denied qualified immunity to Oswald by construing as "deliberate indifference" conduct which was at worst mere negligence.

The Second Circuit decision, if allowed to stand, will undermine the crucial distinction developed by this Court between the analysis to be given to decisions which are made in haste, under pressure, at times of extreme stress during a deadly and ongoing prison riot, and the analysis to be given to decisions which can be made more leisurely, with the luxury of time to reconsider, during the ordinary operations of a prison. Moreover, should the decision below be allowed to stand, it will allow a jury to second-guess Commissioner Oswald's conduct in direct conflict with this Court's recently rearticulated point that "mere negligence would satisfy neither [the *Whitley* standard] nor the more lenient 'deliberate indifference' standard [of *Estelle*] . . ." *Wilson v. Seiter*, 59 U.S.L.W. 4671, 4674 (U.S. June 17, 1991) (No. 89-7376).

II

THE SECOND CIRCUIT'S REVIEW OF OSWALD'S DECISION TO RELY ON THE NATIONAL GUARD, AS EXPERTS, FOR THE MEDICAL PLANNING IS IN CONFLICT WITH THIS COURT'S *WHITLEY* STANDARD

In this Court's recent review of the analysis to be given to official conduct in Eighth Amendment cases, it reiterated the well-established principle that the "wantonness" by which conduct is assessed in an emergency situation where officials are acting in response to a prison disturbance consists of acting "maliciously and sadistically *for the very purpose of causing harm*." *Wilson*, 59 U.S.L.W. at 4673, emphasis added, *quoting Whitley*, 475 U.S. at 320-321, which was *quoting Johnson v. Glick*, 481 F.2d 1028, 1033 (1973). These cases clearly teach that an inquiry must be made into the state of mind of an official who acts under prison riot conditions.

In *Whitley*, this Court taught that while the deference to prison officials' decisions made in response to an actual confrontation with riotous inmates does not insulate from review actions which were taken in bad faith and for no legitimate purpose, it does require that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice under conditions demanding hasty decisions under pressure. If there is a "plausible basis for the official's belief" that the decision was not made "maliciously and sadistically for the very purpose of causing harm," the necessary wantonness has not been found. *Whitley*, 475 U.S. at 323, 320-321. And, "[u]nless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain . . ., the case should not go to the jury." *Id.* at 322.

Despite this clearly articulated guidance, however, the Second Circuit failed to apply the *Whitley* standard to the decision made by Oswald to rely upon the National Guard for the medical planning for prisoner care following the forcible retaking of the prison. The Court failed to consider the conditions under which

this decision was made, but simply likened it to the normal obligation of a prison official to meet the minimal needs of those in his custody. (A. 9.) In *Whitley*, the situation which led to the articulation of the "wanton and willful" standard consisted of a brief riot by several inmates in which one guard was taken hostage. Oswald's decision to rely upon the National Guard for the medical planning, however, was made at the very height of the most severe American prison riot ever under conditions far more exigent than those of concern in *Whitley*. The Second Circuit's artificial and improper distinction between the retaking plan and the contemporaneous medical planning ignored the essential interrelationship of the two. In the critical riot conditions of Attica at the time, the ordinary had given way to the extraordinary and the normal to the highly abnormal. Commissioner Oswald, as the senior corrections official on the scene, had been deeply involved for more than three days and nights in the complex and critical problems caused when some 1200 inmates rioted and held 43 guards hostage. Oswald, for example, had been engaged in extensive negotiations with the inmates, worked tirelessly with the observers group on the demands, and been in constant communication with the Governor. The planning for medical treatment that might be needed after the suppression of the riot was just one of the many weighty matters demanding his attention during this crisis. Moreover, Oswald had no personal expertise in planning a forceful retaking or in the type of weaponry to be used, and he thus had no prior accurate knowledge of the extent of casualties which might be anticipated if and when it was deemed necessary for the uprising to be forcibly suppressed. Accordingly, Commissioner Oswald specifically relied for the medical planning upon the individual who did have such expertise — General Baker, Commander of the National Guard, who had a medical unit less than one mile away from Attica on the morning of September 13.

Thus, the Second Circuit's decision to second-guess Oswald's determination to rely upon others with special expertise for planning for medical care under the extraordinary events then occurring at Attica is *exactly* the sort of critique on the basis of hindsight of "decisions necessarily made in haste, under

pressure and frequently without the luxury of a second chance," which this Court fervently warned against in *Whitley*, 475 U.S. at 320. The question of the reasonableness of Oswald's reliance on the experts should have been analyzed in terms of whether, under *Whitley*, such reliance amounted to "obduracy or wantonness" on Oswald's part for the very purpose of "maliciously and sadistically" causing harm to the inmates, or whether some plausible reason such, as his ignorance of the extent of the injuries to be expected after a quasi-military retaking and his numerous other equally pressing responsibilities, reasonably led Oswald to rely on the National Guard for their expertise. Instead of analyzing Oswald's choice for maliciousness and sadistic intent, however, the Court of Appeals affirmed the District Court's denial of qualified immunity on the grounds that this delegation of authority by Oswald creates a jury issue under the "deliberate indifference" standard of *Estelle*. (A. 10.)

Even under the *Estelle* "deliberate indifference" standard, however, the Second Circuit misconstrued the facts and misapplied the standard to deny qualified immunity to Oswald for the medical planning. *Estelle* requires "an unnecessary and wanton infliction of pain," conduct "repugnant to the conscience of mankind."[2] *Estelle*, 429 U.S. at 105-106. Again, the inquiry must be into Oswald's state of mind when he relied upon the National Guard experts to plan for medical treatment. *Wilson*, 59 U.S.L.W. at 4672. Because it was objectively reasonable for Oswald to believe that his reliance upon the National Guard experts did not involve a deliberate indifference to an obvious and extreme danger, but that it instead was eminently reasonable to delegate to the experts in military-type actions the preparation for the medical needs which could be anticipated following an armed retaking effort, it is clear that even under the

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[2] Thus, for example, a refusal to treat an injured patient or provide medication to an ill patient, or an injection of penicillin given with knowledge of the prisoner's allergy followed by a refusal to treat the allergic reaction, or ordering a prisoner to do something with knowledge that such conduct will render his medical treatment ineffective, constitute examples of "deliberate indifference." *Estelle*, 429 U.S. at 104, n.10.

Estelle standard the Second Circuit incorrectly denied qualified immunity to Oswald with respect to the medical planning.

The Second Circuit's decision holding that there is a jury question as to whether Oswald acted reasonably in relying on the National Guard for the medical planning thus misconstrues and misapplies both the *Whitley* and the *Estelle* standards. Since this Court decided *Wilson* after the Second Circuit's decision in this case, the lower court was not aware of the reinforcement of the *Whitley* and *Estelle* standards enunciated therein. Accordingly, the Second Circuit's decision must be reviewed now so that Oswald is not forced into a lengthy jury trial in which his conduct will be governed by standards contrary to this Court's teachings in *Estelle*, *Whitley* and *Wilson*.

III

THE SECOND CIRCUIT'S REVIEW OF OSWALD'S CONDUCT DURING THE REHOUSING IS IN CONFLICT WITH THIS COURT'S *WHITLEY* STANDARD.

As noted above, the Court of Appeals artificially and improperly limited the restoring of order and safety at the prison to the brief period during which the actual forcible assault was undertaken. In fact, however, until the prisoners were all rehoused and D Yard had been fully secured, until the last key was turned on the cell of the last rioting prisoner, the insurrection at Attica was not yet over and the prison itself was not yet secured and made safe. Even after the initial armed assault had ended, there were still some 1200 prisoners, with an unknown number of weapons (later determined to be over 1400), who were not yet in secure custody. In addition, the prison had been severely damaged during the days of rioting and as a result large areas of it were uninhabitable. Moreover, during the four days the rioters controlled D Yard, they had dug trenches, built and electrified barricades and otherwise fortified and booby-trapped the area. The Second Circuit incorrectly assumed that the emergency conditions had completely ended as soon as the forcible assault was completed when in fact the rehousing was a necessary and integral part of the efforts required to restore order to the facility and was itself carried out under conditions of great stress and pressure and under the continuing threat of violence and disorder. (A. 10.)

The *Whitley* standard is therefore the appropriate standard for assessing *all* of the decisions made and actions taken by Commissioner Oswald under the circumstances which existed at Attica on September 13, 1971 because the pressures and concerns involved in restoring official control over a huge crowd of tumultuous prisoners in a severely riot-damaged and inmate-fortified prison are subject to the very conditions and concerns recognized (indeed, emphasized) by the Supreme Court in *Whitley* — conditions of haste and pressure, concerns of staff

and inmate safety – which are not relieved until the rehousing has been completed and order is thereby finally restored.

It was undisputed that Oswald did not personally participate in the rehousing and did not participate in, order, or knowingly permit any beatings or reprisals against any inmates. It was also undisputed that Oswald received only one single report of brutality from Mr. Dunbar, his Executive Deputy Commissioner in charge of the rehousing of inmates, regarding an incident which had already occurred and which Mr. Dunbar had immediately stopped. Nevertheless, the Second Circuit denied qualified immunity on the ground that "the claim is that [Oswald] received reports of brutality and *must have* either observed brutality or deliberately avoided seeing it . . . ." (A. 11, emphasis added.) To deny qualified immunity on a "*must have*" ground is to apply a negligence standard of "knew or should have known" to conduct which must be assessed only by either the *Whitley* or the *Estelle* standards. This cannot be allowed to stand.

As already noted, this Court in *Wilson* emphasized that "mere negligence" would satisfy neither [the *Whitley* standard] nor the more lenient "deliberate indifference standard [of *Estelle*]. . . ." *Wilson*, 59 U.S.L.W. at 4674. The decision in *Wilson* highlights the Second Circuit's erroneous determination that there is a jury question with regard to Oswald's conduct during the rehousing. Had the Second Circuit correctly used either the *Whitley* or the *Estelle* standard to assess Oswald's conduct, rather than the negligence standard it did use, qualified immunity would necessarily have been granted to Oswald. Even under the less-demanding *Estelle* analysis, Oswald could be found liable for reprisals only if his conduct was deliberately indifferent to an obvious risk of harm. Under the undisputed facts, there is no evidence whatsoever to suggest that Oswald was deliberately indifferent to the prisoners' welfare. What Oswald "must have" seen in his entry into the prison after the assault is pure conjecture in light of the total lack of any evidence that he had any knowledge of any reprisals beyond the single report of an

already-dealt-with situation. Since the qualified immunity defense can be overcome only if there is evidence that shows that it was not objectively reasonable for Oswald to believe that his conduct did not involve deliberate indifference to the prisoners' welfare, the evidence is simply insufficient to overcome the qualified immunity defense with respect to the reprisals.

If Oswald is entitled to qualified immunity under the "deliberate indifference" standard of *Estelle*, he unquestionably is entitled to qualified immunity under the "heightened" *Whitley* standard. Thus, review by this Court is essential to resolve the Second Circuit's direct conflict with this Court's standards.

IV

A QUALIFIED IMMUNITY DEFENSE CANNOT BE OVERCOME BY A FINDING OF RESPONSIBILITY ON *RESPONDEAT SUPERIOR* GROUNDS

It is apparent that Oswald has been denied qualified immunity not by reason of his own conduct, but because (a) the individuals to whom he reasonably delegated the medical planning may have failed to adequately foresee the ultimate medical needs of the prisoners, and (b) certain individuals involved in the rehousing portion of the efforts to retake control of the prison may have engaged in reprisals against the prisoners, despite Oswald's deputy's efforts to prevent them. In either event, this amounts to a finding of responsibility under the inappropriate and inapplicable theory of *respondeat superior*, and for that reason the Second Circuit decision cannot be allowed to stand.

The Second Circuit, in *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), correctly determined that personal liability could not be imposed upon Governor Rockefeller simply because he was in a position of authority during the inmate rebellion. Nevertheless, the same Court of Appeals then failed to follow its own teachings, and those of this Court (*see, e.g., Monell v. N.Y.C. Dept. of Social Services*, 436 U.S. 658, 691-695 (1978); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989)), when it refused to grant Oswald the protection of qualified immunity simply because he too was in a position of authority. Because, as this Court reaffirmed in *Wilson*, liability may only be imposed on a prison official where the requisite state of mind is shown, the vicarious liability imposed on Oswald by the Second Circuit here in the absence of that mental state should be overturned. *Wilson*, 59 U.S.L.W. at 4672.

CONCLUSIONS

Because it was objectively reasonable for Oswald to have delegated the authority for the medical planning to the experts in medical planning for quasi-military operations, and because it was objectively reasonable for Oswald to believe that the only reprisal of which he was made aware had already been dealt with by his Executive Deputy in charge of the rehousing, there were no grounds for denying Oswald the qualified immunity protection from suit to which he is entitled. Nor were there grounds to hold Oswald liable under a theory of supervisory liability which is in effect *respondeat superior*. The holding below, if allowed to stand, would subvert this Court's intent in its *Whitley* and *Estelle* decisions and the recent reiteration and reinforcement of these decisions in *Wilson*.

It is respectfully requested that this Petition be granted. It is further suggested that, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, and because the Second Circuit's decision is so clearly erroneous that oral argument is unnecessary, this Court should summarily reverse or, in the alternative, remand for reconsideration in light of *Wilson*.

DATED: July 15, 1991

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 686, 687, 688—August Term 1990

Argued: January 10, 1991 Decided: February 27, 1991

Docket Nos. 90-2287, -2289, -2291

AKIL AL-JUNDI, ET AL.,

Plaintiffs-Appellees,

—v.—

VINCENT MANCUSI, KARL PFEIL,
RUSSELL G. OSWALD,

Defendants-Appellants,

THE ESTATE OF NELSON A. ROCKEFELLER, ET AL.,

Defendants.

Before:

KAUFMAN, NEWMAN, and MCLAUGHLIN,
Circuit Judges.

Appeal by corrections officials from the June 26, 1990, order of the District Court for the Western Dis-

trict of New York (John T. Elfvin, Judge) denying motion for summary judgment on grounds of qualified immunity in suit seeking damages for actions occurring during and after the Attica prison riot.

Affirmed in part, reversed in part, and remanded.

JOHN H. STENGER, Buffalo, N.Y. (Kathy R. Lamb, Jaeckle, Fleischmann & Mugel, Buffalo, N.Y., on the brief), *for defendant-appellant Oswald.*

RICHARD E. MOOT, Buffalo, N.Y. (Darryl J. Colosi, Judith M. Bell, Moot & Sprague, Buffalo, N.Y., on the brief), *for defendant-appellant Mancusi.*

IRVING C. MAGHRAN, JR., Buffalo, N.Y. (Mahgran McCarthy & Flynn, Buffalo, N.Y., on the brief), *for defendant-appellant Pfeil.*

ELIZABETH M. FINK, Brooklyn, N.Y. (Dennis Cunningham, Brooklyn, N.Y.; Michael E. Deutsch, Chicago, Ill., on the brief), *for plaintiffs-appellees.*

JON O. NEWMAN, *Circuit Judge*:

The issue on this appeal is whether three senior corrections officials of the State of New York are entitled to avoid trial, on grounds of qualified immunity, in a suit brought by victims of the violence that occurred at

the Attica Correctional Facility in 1971. *See Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 22-24 (2d Cir. 1971) (granting preliminary injunction restraining state officials from engaging in torture, beatings, and other physical abuse). The issue arises on an appeal by Russell G. Oswald, former Corrections Commissioner, Vincent Mancusi, former Superintendent of Attica, and Karl Pfeil, former Assistant Deputy Superintendent of Attica, from the June 26, 1990, order of the District Court for the Western District of New York (John T. Elfvin, Judge) denying their motion seeking summary judgment on grounds of qualified immunity. We affirm in part, reverse in part, and remand for trial.

Background

The background facts underlying the tragic episode with which the name "Attica" is likely to be forever identified are by now familiar. We have set them forth in our early decision upholding preliminary injunction, *Inmates of Attica Correctional Facility v. Rockefeller*, *supra*, and in our more recent decision affirming dismissal of the lawsuit against the estate of former Governor Rockefeller, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir 1989). It suffices to recall that on September 9, 1971, more than 1,200 inmates at Attica rioted and seized control of portions of the prison, and some of them seized corrections officers as hostages. Some of the seized portions were retaken the same day, but prisoners continued to occupy an area known as D-Yard. On September 13, after negotiations failed, Oswald received permission from the Governor to order the State Police to retake the prison by force. The retaking, organized by the State Police, resulted in the deaths

of ten hostages and twenty-nine prisoners. Afterwards, several prisoners were the victims of brutal reprisals.

The amended complaint, filed in 1975, alleged denials of constitutional rights arising from three phases of the operation: the plan to retake the prison and the implementation of that plan, the brutality inflicted upon the inmates thereafter as reprisals, and the prosecution of inmates for crimes committed during the riot. By the time the qualified immunity defense of the three appellants was submitted for the ruling that is challenged on this appeal, the first portion of the amended complaint had been dismissed against Mancusi and Pfiel, and the third portion had been dismissed against Pfiel. In the immunity ruling, Judge Elfvin dismissed the third portion against Oswald and Mancusi. Thus, what remains for trial are the first portion (the planning) as against Oswald and the second portion (the reprisals) as against all three appellants.[1] Whether qualified immunity was established as a matter of law as to these aspects of the amended complaint is the subject of this appeal.

Discussion

Qualified immunity is available on motion for summary judgment if it appears, from undisputed facts, that an officer's conduct did not violate constitutional rights that were clearly established at the time of his actions, or if it was objectively reasonable for him to believe that his actions did not violate such rights. *See Anderson v.*

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1 In addition, the first and second portions of the amended complaint are pending for trial as against the administrator of the estate of John Monahan, formerly a State Police major who planned and led the retaking of the prison. All other defendants have been dismissed for a variety of reasons, many for lack of service.

Creighton, 483 U.S. 635, 638-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987). Prisoners' Eighth Amendment right to be free from brutal treatment had been recognized prior to the Attica riot, *see Wright v. McMann*, 387 F.2d 519, 525-26 (2d Cir. 1967). The Supreme Court has more recently cautioned that the "deliberate indifference" standard applicable to prisoners' medical claims does not apply to "making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance." *Whitley v. Albers*. 475 U.S. 312, 320 (1986). In that context, the test is " 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). This more exacting standard is imposed not to foster brutality that results from deliberate indifference but to lessen the risk of harm to both prisoners and prison personnel that might result if those responsible for restoring order in the context of prison riots became hesitant to act promptly and effectively in apprehension of liability too easily imposed.

Since the contours of the Eighth Amendment's protection in the context of a prison riot were not authoritatively delineated until the Supreme Court's 1986 decision in *Albers*, it is arguable that qualified immunity insulates appellants from liability for any consequences of the decision to retake the prison and of the methods used in the course of the retaking. But we do not understand appellants' argument to press so far, and we would not find such an argument persuasive. *Albers* did not recognize "a constitutional right that had not yet

been declared," *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Rather, it narrowed the scope of a right previously recognized. Thus, appellants cannot and do not contend that they could not reasonably be expected to know that there were constitutional limits on a prison administrator's response to a prison riot. However, they can and do contend that the standard announced in *Albers* governs this case, and they further assert that they are entitled to immunity because it was objectively reasonable for them to believe that their actions did not violate the constitutional rights of the plaintiffs, as refined in the *Albers* decision.

In assessing this claim, we cannot apply the heightened *Albers* standard indiscriminately to all aspects of the conduct alleged to have been taken or condoned by the appellants during the events at Attica. *Albers* insisted that the "deliberate indifference" standard applicable to many Eighth Amendment claims of prisoners must give way in the prison riot context to the "wanton infliction of pain" standard when evaluating a claim concerning the use of force in retaking a prison. As the Court noted, from such considerations as " 'the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,'. . . inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U.S. at 321 (quoting District Court, 546 F. Supp. 726, 733 (D. Ore. 1982)). The use of force to retake the prison is the essence of the first category of the prisoners' amended complaint, and there can be no doubt that the *Albers* standard applies to all aspects of

the decision to use force in accomplishing the task and in the implementation of that decision. *Albers* does not mean that a prison riot affords prison administrators limitless authority to employ any means, no matter how brutal, to restore order. It does mean that the decision to use force and the extent of force employed are to be assessed, for purposes of asserted Eighth Amendment violations, under the heightened standard of whether injury and pain were wantonly inflicted "for the very purpose of causing harm." However, this heightened standard, framed to assure prompt and effective action to use necessary force to restore order, does not apply to actions of prison officials unrelated to the decisions about whether and how to use force for that purpose. Thus, in this case, we will apply *Albers* faithfully to those aspects of appellants' conduct implicated in the use of force to retake the Attica prison, but we will not go beyond traditional Eighth Amendment standards in assessing, for purposes of qualified immunity, those aspects of their alleged conduct that are fairly separable from decisions regarding the use of force.

Applying this approach, we turn to the first category of the amended complaint, the allegations against Oswald for his alleged role in the plan to retake the prison. Oswald contends, in an argument focusing more on liability than on the defense of immunity, that he bears no responsibility for the adoption and implementation of the retaking plan because the decision to order a retaking was made by Governor Rockefeller and the formulation and implementation of the specific plan for the retaking was the responsibility of Major Monahan of the State Police. If the liability aspects of the claim against Oswald were before us on this limited appeal, which concerns only the immunity defense, we would

doubt that Oswald would be insulated from responsibility for lack of personal involvement. There appears to be sufficient evidence to support findings that he was the senior corrections official on the scene, that he was aware of the retaking plan, and that he had discussed with Monahan at least some of the specific details of the plan.

However, with the exception of the planning for medical care, the deficiencies in the recapture plan alleged by the plaintiffs do not overcome the immunity defense, assessed under the standards of *Albers*. For example, Oswald is faulted because the plan did not include an ultimatum to the prisoners prior to the attack, because he authorized an assault by a large force of armed men even though the prisoners were first subjected to a barrage of CS tear gas, and because he permitted correctional officers to participate as "backup" to the state police despite the extreme hostility the officers bore toward the prisoners as a result of the takeover and the threats to the hostages. Each of these aspects of the plan, even if attributable to Oswald, might be found to constitute negligence, and some might even be found to show deliberate indifference to the likelihood that harm would result. But, after *Albers* that is not sufficient. To establish liability, there must be evidence to show that these aspects of the assault plan were included wantonly for the purpose of inflicting pain, and to overcome the immunity defense, there must be evidence permitting a finding that it was not objectively reasonable for Oswald to believe that the plan did not involve the wanton inflicting of pain. The decision not to issue an ultimatum is precisely the sort of tactical matter on which "neither judge nor jury [may] freely substitute their judgment for that of officials who have made a consid-

ered choice." *Albers*, 475 U.S. at 322. The decision required weighing the enhanced likelihood of surrender against the enhanced likelihood of precipitating action against the hostages and of enabling the prisoners to improve their defense against the assault. Similarly, whether to use 150 men, as Monahan determined to be necessary, or to use fewer, as plaintiffs believe would have been sufficient, is a choice carrying no inference as to the wanton infliction of pain.

Closer to the line is the decision not to preclude the use of corrections officers entirely from the assault, but here again, tactical choices needed to be made; the use of corrections officers, even as backup, posed a risk of aggressive conduct, but the failure to use them posed a risk of prolonging the battle between state police and armed prisoners, with dire consequences for all concerned. In terms of the immunity defense, we conclude that no reasonable jury could find that Oswald did not have objectively reasonable grounds for believing that the decision to retake the prison and the plan for doing so did not involve the wanton infliction of pain. The defense of qualified immunity as to these portions of the complaint must be upheld.

The alleged deficiency in planning for the medical needs of the prisoners stands on a different footing. Once it was decided to retake the prison by force, the duty to make adequate provision for medical needs arose to at least the same extent as it does with respect to the normal operation of a prison. The *Albers* standard applies to the decision to use force and the means selected for implementing that decision, but not to the normal obligations of prison officials to meet the minimal needs of those in their custody. Thus, Oswald can

be found liable if evidence shows that he was deliberately indifferent to the medical needs that could reasonably be expected to arise in the aftermath of the assault. And Oswald can obtain immunity on a motion for summary judgment only if undisputed evidence shows that it was objectively reasonable for him to believe that his conduct, with respect to planning for medical needs, satisfied at least the constitutional standards of *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (deliberate indifference to serious medical needs is cruel and unusual punishment). *See Martinez v. Mancusi*, 443 F.2d 912 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971) (anticipating standards of *Estelle v. Gamble*). We agree with Judge Elfvin that the evidence of Oswald's lack of attention to planning for medical needs creates jury issues and precludes sustaining, as a matter of law, a qualified immunity defense to this one aspect of the first portion of plaintiffs' allegations.

We turn next to the second portion of the amended complaint, the allegations of condonation of brutal reprisals against the prisoners after the prison was retaken. There is no basis for applying the heightened *Albers* standard to these allegations. The latitude accorded prison officials in deciding when and how to use force to retake a prison from rioting inmates has no application to the summary infliction of brutal punishment once the riot is quelled. As to such conduct, appellants cannot establish an immunity defense on motion for summary judgment if any evidence shows that it was not objectively reasonable for them to believe that they were adhering to the constitutional standards that apply to prison officials in the administration of prison discipline.

The prisoners make no claims that any of the appellants personally participated in the reprisals or directly ordered them to occur. With respect to Oswald, the claim is that he received reports of brutality and must have either observed brutality or deliberately avoided seeing it when he toured the prison about one hour after the assault ended, at a time when hundreds of inmates were allegedly being beaten and brutalized. These allegations find sufficient support in the evidence to withstand a motion for summary judgment on the issue of qualified immunity. With respect to Mancusi and Pfeil, one prisoner has submitted an affidavit that he saw both appellants observing brutal beatings being administered to himself and other prisoners, and the affidavit of another prisoner corroborates this account. Though appellants urge that these affidavits, filed on the eve of trial, are unworthy of belief, that argument is for the jury. Indeed, there is considerable irony in the argument of prison officials, who have in their custody scores of prisoners convicted on the testimony of disreputable criminals, that the testimony of criminals is incredible as a matter of law when it accuses them of unconstitutional conduct.

Appellants' remaining contentions have nothing to do with the defense of qualified immunity, which is the subject of this interlocutory appeal, *see Neu v. Corcoran*, 869 F.2d 662, 664-65 (2d Cir.), *cert. denied*, 110 S. Ct. 66 (1989), and we decline to consider them. However, we do express our concern that this case should be brought to trial at the earliest possible moment. At oral argument counsel for the plaintiffs assured us that they were ready for trial immediately following the disposition of this appeal. We urge the District Court to hold

them to that commitment and to tolerate no delays by the defendants.

The order of the District Court is affirmed in part and reversed in part, and the case is remanded for a prompt trial. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL JUNDI a/k/a Herbert Scott Deane, et al,

Plaintiffs

vs. CIVIL 75-132E

THE ESTATE OF NELSON A. ROCKEFELLER, et al,

Defendants.

SIR/MADAM: Take *NOTICE* OF AN ORDER, a JUDGMENT of which the within is a copy, duly granted in the above entitled action on the 26 day of June, 1990, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 26 day of June, 1990.

DATED: Buffalo, New York
June 27, 1990

MICHAEL J. KAPLAN, Clerk
United States District Court
Western District of New York
Buffalo, New York 14202

cc: Donald P. Berens, Jr., Esq.
Irving Maghran, Jr., Esq.
Richard Moot, Esq.
Michael E. Deutsch, Esq.
Joshua Effron, Esq.
John Stenger, Esq.
Elizabeth Fink, Esq.
Michael McCarthy, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, a/k/a Herbert Scott Deane; BIG BLACK, a/k/a Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legal Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERNE BARKLEY, Mother and Legal Representative of L.D. BARKLEY, deceased; JOMO JOKA OMOWALE, a/k/a Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CHARLES "FLIP" CROWLEY; WILLIAM MAYNARD, JR; CALVIN HUDSON; KIMANTHI MPINGO, a/k/a Edward Dingle; KENDU HAIKU, a/k/a Willie Stokes; OOJI KWESI SEKOU, a/k/a Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD HAYNES; RAYMOND SUMPTER; OMAR SEKOU TOURE a/k/a Otis McGaughey; DACA-JEWEIAH, a/k/a John Hill; and JOHNNIE BARNES, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Plaintiffs,

CIV-75-132E

MEMORANDUM
and
ORDER

-vs-

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL G. OSWALD; T. NORMAN HURD; WALTER DUNBAR; WIM VAN EEKEREN; JOHN C. MILLER; JOHN MONAHAN; JOHN C. BAKER; A.C. O'HARA; VINCENT MANCUSI; LEON VINCENT; CARL PFEIL; ROBERT F. FISCHER; DALTON CARNEY; HENRY WILLIAMS; J.C. MOOCHLER; A.T. MALOVICH; ROBERT P. QUICK; W.L. SHURTER; K.E. GELLERT; G.K. ELBET; T.N. KRUK; W.K. DILLON; M.K. HALLORAN; K.S. CROUSE; R.J. DWYER; P.P. ZELINSKI; G.R. TORAY; J.B. CONNELL; B. MUTHIG; D.O. PARR; J.J. PATTERSON; J.W. McCARTHY; D.O. ELLIS; E.M. BYRE; and JOHN DOES NOS. 1-100,

Defendants.[1]

This is a civil rights class action suit arising out of an inmate uprising at the Attica (N.Y.) Correctional Facility ("Attica") in September 1971. Each of defendants Russell A. Oswald (the former Commissioner of New York's Department of Correctional Services), Vincent Mancusi (the former Attica Superintendent) and Karl Pfeil (Mancusi's Assistant Deputy) has presently moved for summary judgment.

The undisputed background facts of the uprising are recounted in a prior decision in this matter and need be only

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[1] Plaintiffs Durham, Lundy, Hicks, McNeil, Santos and Barkley have been dismissed for lack of standing. Memorandum and Order, dated October 30, 1979, at p.21. Plaintiff Barnes has recently been added by consolidation of a related suit. *See Barnes* v. *State of New York*. CIV-73-442E (W.D.N.Y. January 8, 1990). He had sued certain defendants which are not parties to this action – *viz*, The State of New York, Paul D. McGinnis and The State Corrections Committee. The claims against these defendants are deemed to have been abandoned. Concerning the status of the various captioned defendants herein, *see* fn.6 hereinbelow.

briefly summarized for purpose of the present motions. *See Al-Jundi* v. *Estate of Rockefeller*, CIV-75-132E (W.D.N.Y. September 24, 1988), *aff'd*. 885 F.2d 1060, 1062-1065 (2d Cir. 1989).[2] More than 1200 Attica inmates rioted and occupied certain areas of the prison September 9, 1971. These inmates, or certain of them, also took as hostages numerous corrections officers. Several areas of the prison were re-captured that same day by corrections officers assisted by State Police officers,[3] and the inmate take-over was consolidated to certain limited areas, including a prison space known as "D-Yard." Commissioner Oswald arrived on the scene in the afternoon of September 9th and negotiations between him and the inmates were commenced and continued for several days until the morning of September 13th. It was then that Oswald delivered a final plea to the inmates to release their hostages and restore order. This plea was rejected. Oswald then obtained authorization from the now-deceased Governor Nelson Rockefeller to order the State Police to retake the prison, with force if necessary.

The now-deceased Major John Monahan of the State Police devised the plan for re-capturing Attica. The plan proved successful in the sense that the prison was re-captured and order was restored, but in the process ten hostages and twenty-nine inmates lost their lives. Afterward, brutal reprisals allegedly were inflicted on the prisoners.

The Amended Complaint, filed September 11, 1975,[4] denominates eleven separate causes of action. The divisions

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[2] Both this Court's decision and the appellate decision affirming such contain detailed background discussions.

[3] Eleven hostages were rescued, one of whom later died of inmate-inflicted wounds.

[4] The Amended Complaint is labelled by the plaintiffs simply "COMPLAINT-CLASS ACTION," but was their second pleading herein, filed of right, and has been construed and regarded by this Court as their Amended Complaint. *See* Memorandum and Order, dated October 30, 1979, at p.2 fn.2 & p.4 fn.3.

among these counts are not readily comprehensible, whether by defendants, by causes of action or by sequence of events,[5] and hence this Court, in its prior orders, has endeavored to establish a more natural division of the claims therein. The Amended Complaint has been broken down sequentially into "three sections."

> "The first deals with the plan to retake and the actual retaking of the prison, the second complains of the alleged "reprisals" that occurred after the retaking and the third is concerned with the criminal prosecution of inmates for their participation and involvement in the events preceding and leading to the armed retaking." *Al-Jundi* v. *Estate of Rockefeller, supra*, at p.2.

Moreover, it has been understood throughout this lengthy litigation that each of the various constitutional claims (brought under the due process and equal protection clauses of the Fourteenth Amendment, the cruel and unusual punishment proscription of the Eighth Amendment, and the due process clause of the Fifth Amendment), as well as the claims asserting a conspiracy to deprive the plaintiffs of their civil rights under 42 U.S.C. §1985(3), relates to each sequential section. *See Al-Jundi* v. *Estate of Rockefeller) supra*, at p.2.

Pertinently, for purposes of the instant motions, the allegations of the first section of the Amended Complaint have already been dismissed as against Mancusi and Pfeil. *See* Memorandum and Order, dated October 30, 1979, at p.40. Pfeil has also been dismissed with relation to the allegations of the third section.

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[5] So far as can be ascertained, all counts relate to all defendants, although certain counts identify certain defendants by name as being among others. Several counts reference identical constitutional and/or statutory provisions, and the first count, aside from its substantive claim or claims, makes jurisdictional allegations, and identifies the parties and "facts" common to all counts. Finally the lattermost counts are largely one-sentence reallegations-by-reference of earlier paragraphs labelled with different asserted causes of action.

Id., at pp. 33-36, 40. Each of the three sections remains operative as to Oswald.[6]

In support of their motions for summary judgment, each of Oswald, Mancusi and Pfeil has asserted that he enjoys qualified immunity from suit.[7] They also argue that the undisputed material facts do not support the plaintiffs' constitutional claims against them.

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[6] As for the other defendants, the estate of the late Governor Rockefeller had been substituted in his stead upon his death in 1979, and the estate was eventually dismissed on the basis of qualified immunity and the Governor's lack of personal involvement in the events. *Al-Jundi* v. *Estate of Rockefeller*, *supra*. Dunbar was dismissed for the plaintiff's failure to substitute his estate following his death in 1975. Memorandum and Order, dated October 30, 1979, at pp. 7-8. Van Eekeren, Miller, Vincent, Hurd, Carney, Williams, Moochler, Malovich, Quick, Shurter, Gellert, Elbet, Kruk, Dillon, Halloran, Crouse, Dwyer, Zelinski, Toray, Connell, Muthig, Parr, Patterson, McCarthy, Ellis and Byre were all dismissed for lack of service upon them of the Amended Complaint. *Id.*, at pp. 7, 14. New York Deputy Attorney General Fischer was dismissed on the basis of prosecutorial immunity. *Id.*, at pp. 28-29 *and* Order, dated April 23, 1980. Baker was dismissed without opposition. Order, dated October 20, 1980. O'Hara was dismissed for lack of allegations of personal involvement. Memorandum and Order, dated October 30, 1979, at p.40. And the defendants Doe were all dismissed for the plaintiff's failure to substitute named defendants within a reasonable period of time. *Id.*, at p.15. Aside from the three movants, the only remaining defendant is the late John Monahan, whose estate might or might not be substituted depending on this Court's resolution of a pending motion. *See* Memorandum and Order, dated June 14, 1990.

[7] As an off-shoot of their qualified immunity defenses, each also contends that an action asserting a deprivation of constitutional rights brought under 42 U.S.C. §1983 cannot lie against them, inasmuch as state officials acting in their official capacities are not "persons" who may be sued within the contemplation of section 1983. *See Will v. Michigan Dept. of State Police ("Will")*, 490 U.S.____, 109 S.Ct. 2304 (1989). This contention, however, is nothing more than a warmed-over version of an Eleventh Amendment *sovereign* immunity defense under a slightly variant theory. And these defendants have already been dismissed from this suit in their official capacities. Memorandum and Order, dated October 30, 1979, at pp. 15-16. Nothing in *Will* or the Eleventh Amendment precludes a section 1983 suit against state officials in their *individual* capacities, which is precisely the footing upon which this suit against these defendants presently stands.

Because qualified immunity provides immunity from suit and not merely a shield to liability — *Al- Jundi* v. *Rockefeller, supra*, 869 F.2d at 664; *see Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) ("even such pretrial matters as discovery are to be avoided if possible") —, this Court will first address this defense before considering the adequacy of the facts to support the plaintiffs' claims. The qualified immunity doctrine seeks to strike a balance between protecting the rights of individuals, on the one hand, and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," on the other. *Butz* v. *Economou*, 488 U.S. 478, 506 (1978). Thus, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action in question has previously been held unlawful, *** but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

The *current* state of the law is set forth in a 1986 decision, *Whitley* v. *Albers*, 475 U.S. 312, wherein the Court enunciated the "standard govern[ing] a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot." *See id.*, at 314. It was first noted that "[n]ot every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny ***." *Id.*, at 319. " 'After incarceration, only the " 'unnecessary and wanton infliction of pain' " . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.' " *Ibid.* (*quoting from Ingraham* v. *Wright* ,430 U.S. 651, 670 (1977)). In applying this standard to a "prison security measure *** undertaken to resolve a disturbance," the Court determined that

> "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately

> turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Id.*, at 320-321 (*quoting from Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* Employee Officer John *v.* Johnson, 414 U.S. 1033 (1973)).

Courts must determine on a summary judgment motion, however, "whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain ***, the case should not go to [trial]." *See id.*, at 322 (discussing the approach on a motion for directed verdict); *see also Anderson* v. *Liberty Lobby*, 317 U.S. 242 (1986) (equating the standards for directed verdict and summary judgment motions.) The factors to be considered in applying this approach include (1) the need for the application of force, (2) the relationship between such need and the amount of force employed and (3) the extent of injury indicted thereby. *Whitley* v. *Albers*, *supra* at 321. "From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Ibid.* But other factors, such as the threat to the safety of prison staff and inmates and any efforts to avoid or temper a forceful response, are "equally relevant." *Ibid.*

Although *Whitley* v. *Albers*, *supra*, was not enunciated until 1986, its application of the cruel and unusual punishment clause to prison officials' efforts to quell an inmate uprising displays nothing more esoteric than a common-sense approach to the problem and, moreover, derives its inspiration from the accumulated wisdom of Eighth Amendment decisional law dating well prior to September 1971. *See Ingraham* v. *Wright*, 430 U.S. 651, 670 (1977) (cited in *Whitley* v. *Albers* as authority for the wantonness standard); *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976) (relied upon in *Ingraham* v. *Wright*); *Gregg* v. *Georgia*, 428 U.S.

153, 173 (1976) (relied upon in *Estelle* v. *Gamble*); *Furman* v. *Georgia*, 409 U.S. 238, 392-393 (1972) (Burger C.J., dissenting) (cited in *Gregg* v. *Georgia*); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463-464 (1947) ("abundantly clear" to Chief Justice Burger therefrom "that the Court was disapproving the wanton infliction of physical pain"); *see also Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1878) (the "apparent seed," in Burger's evaluation, of the Eighth Amendment ban against "unnecessary cruelty'); *cf.*, *Rochin* v. California, 342 U.S. 165, 172-173 (1952) (law enforcement conduct that shocks the conscience" is violative of due process). The defendants here, while not having had the benefit of the instruction of *Whitley* v. *Albers* at the time of the riot, should intuitively have been aware of the rule to be gleaned therefrom. The law was not express in 1971, but it certainly was "apparent" within the meaning of qualified immunity jurisprudence. *See Anderson* v. *Creighton supra*, at 640.

The plaintiffs urge that Oswald's recommended approval of the Monahan plan to recapture Attica was a wanton act undertaken with callous disregard for its potential infliction of harm upon the rioting inmates and their hostages. Specifically, they allege that such plan failed to account for the "emotionally and racially charged atmosphere prevailing among the members of the assault force," failed to provide an adequate command structure to ensure the application of force would not become excessive or vindictive, failed to warn the inmates of the imminence of the assault or provide them with a means to surrender in the face thereof and, finally, failed to make allowance for adequate medical care for persons injured during the assault. Amended Complaint, ¶38. Monahan's plan for re-taking D-Yard, according to his account, was to involve two groups of seventy-five State Police officers converging upon D-Yard armed with .38 caliber handguns and shotguns loaded with "double-O" buckshot. Accompanying them was to be an indeterminately-numbered National Guard tear gas unit. Additionally, there were to be six sharpshooters on the C-Block roof armed with .270 caliber rifles to provide cover fire if needed. Prior to the assault, a National Guard helicopter was to drop tear gas in D-Yard, while behind the initial forces a twenty-five man State Police squad accompanied by two corrections officers was to enter D-Yard

for purpose of identifying and rescuing hostages. These men were armed comparably with the assault force. *See* Testimony of Monahan before the New York State Special Commission on Attica ("McKay Commission"), April 25, 1972, at p.1604 (endorsing the description given by another witness, at pp.1580-1591, as "very accurate"). Oswald's understanding of the plan to retake the prison was derived from discussions with Monahan as well as with Colonel John C. Miller and General A.C. O'Hara of the State Police. *See* Testimony of Russell G. Oswald before the Wyoming County (N.Y.) Grand Jury, September 18, 1972, at p.56. He understood that two groups of approximately thirty State Police officers would converge on D-Yard, that there were to be sharpshooters on rooftops with highpowered rifles to provide cover fire if needed, that prior to the assault there was to be a precision-dropping of tear gas by the National Guard by helicopter into D-Yard, and that approximately twenty State Police officers along with two corrections officers were to follow the assault force for purpose of identifying the hostages. *Ibid.* It appears, also, that Oswald gave some attention to providing for medical care, such not being part of Monahan's plan. He remembers discussing it with Mancusi and O'Hara, but ultimately medical care was "left for the National Guard to work out." *See* Oswald testimony before the McKay Commission, *supra*, April 28, 1972, at p.2723.

Neither Monahan's nor Oswald's recollection of the plan alludes to any warnings or ultimatums to be given the inmates respecting the imminency of a forceful retaking of the prison. Likewise neither makes any reference to a prospective chain of command once the State Police were loosed upon the facility. But, perhaps most tellingly, Oswald acknowledges that little attention was given by him to the special medical needs which might arise from such an operation and that, upon approving the assault plan, he did not have any understanding of the specific steps, if any, which had been or would be taken to provide medical care. Oswald's understanding of the plan was likewise vague concerning the size of the assault force which was to descend on D-Yard. Monahan, according to his testimony, devised a pair of 75-man units (150 men in all); Oswald anticipated only sixty men. If Monahan is to be believed

concerning the specifications of his own plan, either Oswald has misrecollected events, was woefully misinformed about this aspect of the plan or was recklessly indifferent to its specifics. This is a question of fact which cannot be resolved on Oswald's instant motion. If Oswald was, in fact, recklessly uncertain of the plan's parameters at the time he approved it or if he recklessly failed to consider issues impacting directly on the reasonableness of the plan, and if its going awry was a reasonably foreseeable result, then Oswald would properly share in the legal responsibility for the ensuing carnage. His recklessness, in this setting, would have been " 'so dangerous that [his] knowledge of the risk can be inferred.' " *Whitley* v. *Albers. supra*, at 321 (*quoting from Duckworth* v. *Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

As for the second section of the Amended Complaint, regarding the plaintiff's' claims that they were subjected to torturous reprisals following the recapture of Attica, which barbarities the movants allegedly witnessed but took no action within their authority to halt – *see* Amended Complaint, ¶¶ 60-61 –, Oswald asserts his lack of personal involvement and has been joined in this argument by Mancusi and Pfeil.

It is undisputed that a great many, if not the vast majority or all, of the Attica inmates were tortured by corrections officers after the prison was retaken and, further, it cannot reasonably be contended that such conduct was permissable under constitutional norms which were clearly-established even in 1971. A "gauntlet" was erected in one of the prison passageways whereby officials were positioned with clubs and prisoners were made to run the length of the passageway, receiving blows and racial epithets along the way. *See Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F.2d 12, 16 (2d Cir. 1971). In other separate instances of abuse, continuing from September 13th until at least September 16th, "[i]njured prisoners, some on stretchers, were struck, prodded or beaten with sticks, belts, bats or other weapons." *Id.*, at 18-19. Some inmates were "burned with matches, and others poked in the genitals or arms with sticks." *Id.*, at 19. The United States Court of Appeals for the Second Circuit, in considering the question of preliminary injunctive relief against reprisals back in

December 1971, characterized the corrections officers' conduct as "an orgy of brutality." *Ibid.* (accepting as true for its purposes the testimony with respect to physical abuse of prisoners). What is disputed respecting the instant movants is their participation in such conduct.

Oswald has given conflicting accounts whether he had been aware of the brutality and hence whether he could have reasonably been expected to employ his authority as the Commissioner of the State Department of Corrections to put a halt to it. Under oath in April 1972, Oswald stated that he had been informed about the gauntlet while still physically present at Attica, but inasmuch as such exercise was "practically" completed by such time and inasmuch as he believed "it was much like a fraternity hazing," he did nothing to stop it. *See* Oswald testimony before the McKay Commission, *supra*, April 28, 1972, at pp. 2720-2721. Eighteen years Oswald attested that he "neither participated in, ordered nor knowingly permitted" any of the alleged brutalities. Affidavit of Russell G. Oswald (sworn to April 5, 1990), ¶20. the inconsistency in these accounts is itself sufficient to establish a genuine issue of fact for trial as to Oswald's personal involvement in the reprisals. A supervising official's failure to remedy a constitutional infringement upon learning of it personally involves the official in the wrong. *Williams* v. *Smith*. 781 F.2d 319, 323 (2d Cir. 1986).

Mancusi also denies having participated in or having had personal knowledge of the reprisals. Affidavit of Vincent R. Mancusi (sworn to February 9, 1990); ¶¶ 9-10. The plaintiffs, however, have pointed to evidence placing Mancusi in the Attica "command center" at relevant times, which should have made him privy to reports of activities occurring in various areas of the prison. *See* McKay Report, *supra*, at p.432 & fn.4. Two of the plaintiffs have supplied affidavits, as well, attesting to having seen the Attica Superintendent personally witness his underlings commit brutalities. *See* Affidavit of Jerome Rosenberg (sworn to May 3, 1990), ¶¶ 7-8; Affidavit of Albert Bictory (sworn to May 3, 1990), ¶¶ 3, 5. As with Oswald, triable issues of fact remain respecting Mancusi's involvement in the reprisals.

Assistant Deputy Superintendent Pfeil denies having observed the torture of inmates as well, claiming not to have been in the locations where such activities are said to have occurred. Affidavit of Karl Pfeil (sworn to March 11, 1990), ¶ 3. Earlier inquiries into events, however, contradict this assertion – *see* McKay Report, *supra*, at p.447 (placing Pfeil in A-Yard September 13, 1971, the place and date of alleged brutalities) – and, again, two of the plaintiffs attest to having seen him witness reprisals. *See* Rosenberg affidavit, *supra*, ¶¶ 7-8; *Bictory* affidavit, *supra*, ¶¶ 3, 5. Judgment respecting Pfeil's liability for these reprisals must also await trial.

Finally as to the third section of the Amended Complaint, concerning the prosecutions brought against certain of the rioting inmates, both Mancusi and Oswald plausibly deny having had anything to do with such legal maneuvers (Pfeil, as noted, has already been dismissed respecting the third section of the Amended Complaint) - *see* Oswald affidavit, *supra*, ¶21; Mancusi affidavit, *supra*, ¶11, – and the plaintiffs have been mute in response. The third section suffers from a complete failure of proof and as such will be dismissed as to Oswald and Mancusi. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986).

Accordingly, it is hereby ORDERED that the third section of the Amended Complaint is dismissed as to Oswald and Mancusi but that these defendants' motions for summary judgment, along with that of defendant Pfeil, are otherwise denied.[8]

DATED: Buffalo, N.Y.
June 26, 1990

/s/John T. Elfvin
U.S.D.J.

[8] These defendants have alternatively requested a determination *in limine* respecting whether they had acted in their official or individual capacities in their alleged actions. Such requests are frivolous and rest upon a miscomprehension of immunity law. *See* footnote 7 hereinabove. They are likewise denied.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term if the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eighteenth day of April, one thousand nine hundred and ninety-one.

AKIL AL-JUNDI, also known as Herbert Scott Deane; BIG BLACK, also known as Frank Smith; ELIZABETH DURHAM, Mother and Legal Representative of Allen Durham, deceased; LITHO LUNDY, Mother and Legal Representative of Charles Lundy, deceased; THERESA HICKS, Widow and Legal Representative of Thomas Hicks, deceased; ALICE McNEIL, Mother and Legel Representative of Lorenzo McNeil, deceased; MARIA SANTOS, Mother and Legal Representative of Santiago Santos, deceased; LAVERNE BARKLEY, Mother and Legal Representative of L.D. Barkley, deceased; JOMO JOKA OMOWALE, also known as Eric Thompson; VERNON LAFRANQUE; ALFRED PLUMMER; HERBERT X. BLYDEN; JOSEPH LITTLE; ROBIN PALMER; GEORGE "CHE" NIEVES; JAMES B. "RED" MURPHY; THOMAS LOUK; PETER BUTLER; CALVIN HUDSON; KIMANTHI MPINGO, also known as Edward Dingle; KENDU HAIKU, also known as Willie Stokes; OOJI KWESI SEKOU, also known as Chris Reed; PHILLIP "WALD" SHIELDS; JEROME ROSENBERG; ALPHONSO ROSS; FRANK LOTT; GARY RICHARD SUMPTER; OMAR SEKOU TOURE, also known as Otis McGaughey; DACAJEWEIAH, also known as John Hill; JOHNNIE BARNES, as Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,

Docket No.
90-2287 (L)
-2289
-2291

Plaintiffs-Appellees,

v.

THE ESTATE OF NELSON A. ROCKEFELLER; RUSSELL G. OSWALD; T. NORMAN HURD; WALTER DUNBAR; WM. VAN EEKEREN; JOHN C. MILLER; JOHN MONAHAN; JOHN C. BAKER; A. C. O'HARA; VINCENT; KARL PFEIL; ROBERT F. FISCHER; DALTON CARNEY; WILLIAMS HENRY; J. C. MOOCHLER; A. T. MALOVICH; ROBERT P. QUICK; W. L. SHURTER; K. E. GELLERT; G. K. ELBERT; T. N. KRUK; W. K. DILLON; M. K. HALLORAN; K. S. CROUSE; R. J. DWYER; P. P. ZELINSKI; G. R. TORAY; J. B. CONNELL; B. METHIG; D. O. PARE; J. J. PATTERSON; J. W. McCARTHY; D. O. ELLIS: E. M. BYRE; JOHN DOES, Nos. 1-100,

Defendants.

VINCENT MANCUSI, KARL PFEIL, RUSSELL G. OSWALD,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by ~~Vincent Mancusi~~ Russell G. Oswald

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION of the UNITED STATES

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

* * * * * *

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

* * *

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

* * * * * *

UNITED STATES CODE

Title 42

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . .

* * * * * *

UNITED STATES CODE

Title 28

§1254. Courts of Appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

* * * * * *